

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RAFAEL R. COLLADO	:	DETERMINATION
D/B/A COLLADO GROCERY	:	DTA NO. 818010
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1995	:	
through May 31, 1998.	:	

Petitioner, Rafael R. Collado, 464 Myrtle Avenue, Brooklyn, New York 11205, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1995 through May 31, 1998.

On December 7, 2000, the Division of Taxation, by its representative Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel), brought a Motion for Summary Determination seeking dismissal of the petition in the above-referenced matter, pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, on the ground that petitioner failed to file a request for a conciliation conference or a petition for a hearing within 90 days after the issuance of a Notice of Determination. Petitioner, appearing by Leonard L. Fein, CPA, filed an affirmation in opposition to the Division's motion on January 2, 2001, which date commenced the 90-day period for issuance of this order pursuant to section 3000.5(d) of the Rules. After review of the motion papers, affidavits, affirmations and documents submitted therewith, and all pleadings and related documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, issues the following determination.

ISSUE

Whether petitioner filed a request for a conciliation conference or a petition for a hearing within 90 days after the issuance of a Notice of Determination.

FINDINGS OF FACT

1. On May 5, 2000, the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS") received from petitioner, Rafael R. Collado, a Request for Conciliation Conference ("Request"). This Request, referencing Notice/Assessment ID L-015610213-9, is filed in the name of Rafael R. Collado d/b/a Collado Grocery and is signed and hand dated May 1, 2000. The envelope in which the Request was mailed, via first class mail, bears the United States Postal Service ("USPS") postmark and cancellation stamp of the Brooklyn, New York post office. On this USPS postmark the month, May, and the year, 2000, are clear and legible. However, the specific day is not clearly legible. The Request, as well as the envelope, bear a BCMS receipt stamp dated May 5, 2000.

2. In response to the foregoing Request, BCMS issued a Conciliation Order. This Order, titled "Conciliation Order Dismissing Request," bears CMS No. 180815 and is dated June 9, 2000. The caption portion of the Order indicates that it pertains to Notice Number L-015610213, and the text of the Order states the following:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on October 13, 1998, but the request was not mailed until May 3, 2000, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

3. Petitioner challenged the denial of his Request by filing a petition with the Division of Tax Appeals. This petition, signed and hand dated August 31, 2000 and stamped as received by the Division of Tax Appeals on September 5, 2000, lists petitioner as Rafael R. Collado, 464

Myrtle Avenue, Brooklyn, New York 11230, and references Notice/Assessment number L-015610213. Petitioner claims, in his petition and in his Request, that he does not speak or read English, that he never received any notice of determination in a language he could understand, and that his Request was filed within 90 days after he understood the notice and related filing requirements vis-a-vis protesting the notice.

4. In response to the petition the Division filed an answer dated November 9, 2000. The Division's answer asserts, *inter alia*, that the Notice of Determination in question was issued on October 13, 1998 and that the Request was not received until May 5, 2000. Accordingly, the Division maintains that the Request was properly dismissed as untimely and that, since neither the Request nor any petition for a hearing was filed within 90 days after the date of issuance of the Notice, such Notice must be sustained. On December 7, 2000, the Division brought the subject motion for summary determination on the same basis set forth in its answer, to wit, that since neither a request for conciliation conference nor a petition for a hearing was filed in a timely manner, there is no jurisdiction to address the matter.

5. In support of its motion, the Division submitted the affidavits of Geraldine Mahon and James Baisley, employees of the Division, as well as a copy of the certified mail record ("CMR") containing a list of the notices of determination allegedly issued by the Division on October 13, 1998.

6. The affidavit of Geraldine Mahon, principal clerk of the Division's Case and Resource Tracking System ("CARTS"), sets forth the Division's general procedure for preparing and mailing notices of determination. This procedure culminates in the mailing of the notices by USPS certified mail and confirmation of the mailing through the receipt and retention of a postmarked copy of the CMR.

7. The computer-generated notices of determination are accompanied by a CMR entitled “Assessments Receivable, Certified Record For Zip + 4 Minimum Discount Mail.” The notices are predated with their anticipated date of mailing, while the CMR is dated in its upper left corner with the actual date of its printing, in this case October 1, 1998. The difference between the anticipated mailing date for the notices and the printing date of the CMR is to ensure that there is sufficient lead time for the notices to be manually reviewed and processed for postage and fees by the Division’s mechanical section prior to mailing. In this case, consistent with the Division’s procedure, the CMR printing date of October 1, 1998 has been lined through and the date “10/13/98” has been handwritten immediately above to indicate and confirm October 13, 1998 as the date of mailing.

8. A certified control number is assigned to each notice listed on the CMR, and such number is recorded on the CMR under the heading “Certified No.” The CMR for October 13, 1998 is a 40-page fan-folded (connected) document. Each page of the CMR is numbered in sequence from 1 through 40, with such page numbers appearing on the upper right corner of each page of the CMR. The certified numbers on the CMR for October 13, 1998 run consecutively from P 911 006 742 through P 911 007 176. Each page of the CMR lists 11 items of certified mail, with the exception of page 40 which lists 6 items of certified mail, for a total of 435 items of certified mail listed on the CMR. The certified control number P 911 006 869, corresponding to the entry listing petitioner’s name, Rafael R. Collado, address, 464 Myrtle Avenue, Brooklyn, New York 11205-2522, and Notice Number, L-015610213, is found on page 12 of the CMR.¹ Each page of the CMR, including specifically page 12, is date stamped October 13, 1998 by the

¹ The portions of the CMR which pertain to taxpayers other than petitioner have been redacted to preserve the confidentiality of those other taxpayers.

Colonie Center branch of the USPS in Albany, New York. At the bottom of page 40, the number “435” has been circled as the “Total Number of Pieces Listed,” beneath which appear the initials of the postal employee to verify the receipt of 435 pieces of certified mail by the USPS.

9. The affidavit of James Baisley, Chief Mail Processing Clerk in the Division’s Mail Processing Center (“ mailroom”), attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a piece of correspondence, including a statutory notice, is placed in the “Outgoing Certified Mail” basket in the mailroom, a member of the mailroom staff operates a machine which puts each notice in an envelope, weighs and seals each envelope and places postage and fee amounts thereon. A mailroom clerk then checks the first and last pieces of mail listed on the CMR against the information contained on the CMR, and also performs a random review of 30 or fewer pieces of certified mail by checking the information on the envelopes against that appearing on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office. Mr. Baisley’s knowledge that the postal employee circled the number “435” on page 40 of the CMR and initialed the same page to indicate the receipt of 435 pieces of certified mail is based on the fact that the Division’s mailroom specifically requested that the postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. The CMR is the Division’s record of receipt, by the USPS, for the pieces of certified mail listed on the CMR. In the ordinary course of business and pursuant to the practices and procedures of the Division’s mailroom, as followed in this case,

the CMR is picked up at the post office by a member of Mr. Baisley's staff on the following day after its delivery and is then delivered to the originating office within the Division (here CARTS).

10. Included with the Division's exhibits was a copy of petitioner's Quarterly Sales and Use Tax Return ("Form ST-102") for the period March 1, 1998 through May 31, 1998, the last sales tax quarterly period included under the assessment at issue. This sales tax return lists petitioner's address as Rafael R. Collado, Collado Grocery, 464 Myrtle Avenue, Brooklyn, New York 12205-2502. The Division also submitted a copy of the Notice of Determination in question, dated October 13, 1998, listing the same address for petitioner, specifying assessment number L-015610213-9, and carrying on its upper center section the certified number P 911 006 869.

11. Petitioner's affirmation in opposition makes the same claim as was raised in the Request and in the petition, and also asserts that petitioner never received the notice of determination until he received a copy thereof from the Division's Collection Unit.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed or if a return required under Article 28, when filed, is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1), as in effect at the beginning of the period at issue, such a determination "shall finally and irrevocably fix the tax" unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Division's BCMS following the issuance of a Notice of Determination so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to these provisions, then,

petitioner had 90 days from the issuance of the subject notice to file a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals.²

B. Where a taxpayer fails to file either a timely Request or a petition contesting a Notice of Determination, the Division of Tax Appeals has no jurisdiction over the matter and is statutorily precluded from hearing the merits of the case, (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). There is no claim that a petition was filed at any time within 90 days after issuance of the notice in this case. In fact, it appears undisputed that the first action by petitioner protesting the notice was the filing of the Request. Further, there is no dispute that the Request in this matter was filed with the Division when it was mailed in May 2000. The only issue presented, then, is whether the mailing of petitioner's Request in May 2000 was within 90 days after the issuance (mailing) of the Notice of Determination.

C. As set forth above, it is the mailing date of the statutory notice which triggers the 90-day period within which a protest must be filed. Where, as here, a taxpayer files a Request, but the timeliness of the Request is at issue, the Division bears the burden of proving proper mailing of the statutory Notice of Determination (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered to the custody of the USPS (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a notice is found to have been properly mailed by the Division, a presumption arises that the notice was

² Tax Law § 1138(a)(1) was amended for years beginning January 1, 1997 to state that the notice "shall be an assessment" unless a petition is filed within 90 days (*see* L 1996, ch 267, § 3). While the caption indicates that a portion of the period covered by the underlying notice in this case falls after January 1, 1997, the record does not provide sufficient information to determine the possible applicability of amended section 1138(a)(1) *vis-a-vis* payment of tax for such post January 1, 1997 period followed by the filing of a claim for refund.

received by the person to whom it was addressed (*see, Engel v. Lichterman*, 95 AD2d 536, 467 NYS2d 642, 643, *affd* 62 NY2d 943, 479 NYS2d 188; *Matter of Katz, supra*). However, the “presumption of receipt” does not arise unless or until sufficient evidence of mailing has been produced and, as noted, the burden of demonstrating proper mailing rests with the Division (*see, e.g., Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). In turn, the mailing evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices. Furthermore, the Division has offered adequate proof to establish the fact that the particular notice at issue was actually mailed to petitioner on October 13, 1998, the date appearing on the face of the notice. The affidavits generally describe the various stages of producing and mailing notices and, in addition, attest to the authenticity and accuracy of the copies of the notice and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Mahon and Baisley affidavits were followed with respect to the notice issued to petitioner. Petitioner’s name and address appear on page 12 of the CMR which, along with every other page of the CMR, bears a USPS date stamp of October 13, 1998. There are 435 certified mail control numbers listed on page 40 of the CMR, and the USPS employee who initialed the CMR on such page indicated, by circling the number

“435” near his initials, that he received 435 items for mailing. In short, the Division established that it mailed the notice of determination to petitioner by certified mail on October 13, 1998 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

E. Conciliation Order No. 180815 denied petitioner’s request for a conciliation conference on the basis that the request was not filed within 90 days after the issuance of the underlying statutory notice of determination. Since the Division has established October 13, 1998 as the issuance date of the notice, any Request or petition challenging such notice had to have been filed by January 12, 1999 (i.e., within 90 days after October 13, 1998) in order to have been timely. Unfortunately, the Request was not filed until May 1, 2000 at the earliest, which is clearly well in excess of 90 days after issuance of the notice.

F. Petitioner made no allegation that the Notice was improperly addressed or mailed by the Division. With regard to the issue of receipt of the Notice, it was incumbent upon petitioner to challenge and provide evidence to overcome the presumption of receipt which arose upon the Division’s demonstration of proper mailing. Petitioner made only the bare assertion that he did not receive the Notice in due course but rather only learned of it when he received a copy from the Division’s Collection Unit. However, petitioner presented no evidence to contest the facts concerning mailing as described in the Mahon and Baisley affidavits and borne out by the CMR and other documentary evidence provided. Further, petitioner neither alleged nor established error in delivery of the Notice by the USPS. Petitioner’s general denial of receipt of a properly mailed notice is insufficient, as a matter of law, to overcome the presumption of receipt (*T. J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97, 98-99). Finally, petitioner alleged that he did not file a protest within 90 days because he does not speak or read English and therefore did not understand such time requirement. However, there is no requirement under the

Tax Law that a statutory notice must be issued in any language other than English (*see* Tax Law §§ 1138, 1147[a][1]; 3003, 3004, 3005), nor does petitioner specify which particular language he does speak and read. Upon all of the proof presented, and pursuant to the foregoing discussion, I conclude that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor. That is, the Division has tendered evidence establishing proper mailing of the Notice, and there was no protest thereafter within 90 days as required, thus leaving no jurisdiction to address the merits of the underlying notice of determination. Accordingly, pursuant to 20 NYCRR 3000.9(b)(1), summary determination in favor of the Division will be granted.

G. The Division's motion for summary determination is granted, the petition of Rafael R. Collado d/b/a Collado Grocery is denied, and the Notice of Determination dated October 13, 1998 is sustained.

DATED: Troy, New York
March 08, 2001

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE